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EXAMINER

KING, FELICIA C

ART UNIT	PAPER NUMBER
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1794

NOTIFICATION DATE	DELIVERY MODE
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04/27/2009

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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Office Action Summary	Application No. 10/579,089	Applicant(s) SMITH ET AL.	
	Examiner FELICIA C. KING	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 May 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15, 18, 19, 22, 24 and 31-73 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15, 18, 19, 22, 24 and 31-73 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>3/9/07, 10/11/07, 1/9/09</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Objections

1. Claim 18 is objected to because of the following informalities: Claim 18 does not appear to be dependent upon a specific claim due to its current wording. However, Claim 18 has been interpreted as dependent upon Claim 1. Appropriate correction is required.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-4 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Regarding claim 1, the phrase "if required" in part (c) of the instant claim renders the claim indefinite because it is unclear whether the limitations preceding the phrase are part of the claimed invention. See MPEP § 2173.05(d).

4. Regarding claim 2, the phrase "if required" in part (c) of the instant claim renders the claim indefinite because it is unclear whether the limitations preceding the phrase are part of the claimed invention. See MPEP § 2173.05(d).

5. Regarding claim 2, the phrase "if required" in part (d) of the instant claim renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

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6. Regarding claim 3, the phrase "if required" in part (c) of the instant claim renders the claim indefinite because it is unclear whether the limitations preceding the phrase are part of the claimed invention. See MPEP § 2173.05(d).
7. Regarding claim 3, the phrase "optionally" in part (f) of the instant claim renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).
8. Regarding claim 4, the phrase "if required" in part (c) of the instant claim renders the claim indefinite because it is unclear whether the limitations preceding the phrase are part of the claimed invention. See MPEP § 2173.05(d).
9. Regarding claim 4, the phrase "if required" in part (d) of the instant claim renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

Claim Rejections - 35 USC § 103

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

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2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

12. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

13. Claims 1, 4, 5, 9, 10-13, 15, 18, 19, 22, 63-67, 69-72 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US patent 6,177,118) and further in view of Lashkari (UK 1,057,170) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).

14. **Regarding Claims 1, 11-13, 18, 19, 22:** Blazey discloses a process of making cheese by providing a concentrated milk to produce a retentate and supplementing the concentrated milk with a protein concentrate and including fat (in the form of butter) and flavor and applying lactic acid and heating the mixture to 80°C for 2 minutes without holding for fermentation [col. 4, lines 32-39; col. 8, lines 45-47] but does not disclose where the flavor composition contains a strain of organism. Blazey does not explicitly disclose formation of a coagulated cheese mass but it does provide for like materials (lactic acid) used in a like manner (heated with the protein and fat) which would indicate

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that a cheese mass was formed by heat coagulation where Skovhauge teaches lactic acid as a coagulant and that heat coagulated cheeses are made at temperatures between 50°C - 100°C [col. 3, lines 37-50]. However, Lashkari discloses a cheese flavor composition containing an edible mold which is *Penicillium roqueforti* [col.1, lines 17-24] can be added to a food composition to provide a cheesy flavor.

15. At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Blazey and Lashkari before him or her to modify the cheese product of Blazey to incorporate the cheesy flavor of Lashkari in order to make a flavor typical of blue cheese without months of aging/curing to create natural blue cheese as is usual in the art [Groesbeck col. 1, lines 20-27]. Blazey's process is specifically directed towards a cheese product that does not require fermentation and where the mixture of protein and fats [col. 10, lines 49-51; col. 11, lines 1- 5]. Lashkari discloses where the flavoring component is highly flavored and does not require further treatment in order to be added to a food component [col. 3, lines 43-46]. Because Blazey discloses the need for a flavor agent by its inclusion in the process of making the cheese product it would have been obvious to flavor the cheese product with the blue cheese flavoring of Lashkari in order to give a specific highly flavored product without having to wait for months to produce the flavor as is known in the art, and to give more variety to the consumers as Blazey discloses flavoring for American cheese, Cheddar cheese, Mozzarella, Ricotta, and cream cheese.

16. Regarding Claims 4, 65, 66, 67: Blazey discloses a process of making cheese as discussed in Claim 1 and further discloses dividing cheese into slices, block form, or

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in tubs and that because making a cheese mass is the first step in making processed cheese that other ingredients can be added to the cheese to product block forms, slices and spreads [col. 7, lines 57-67. col. 8, lines 1-5]. Skovhauge teaches coagulation with lactic acid and at temperatures as discussed above in claim 1. Lashkari discloses a cheese flavor composition as discussed above in Claim 1.

17. Regarding Claim 5: Blazey discloses dividing the cheese into slices, blocks or spreads [col. 7, lines 57-67. col. 8, lines 1-5] where the instant claim recites dividing into portions.

18. Regarding Claims 9, 63: Blazey discloses Mozzarella made by the process that has body, texture and the ability to be grated [col. 15, lines 35-37] where the instant claim recites shredded or particulated.

19. Regarding Claims 10, 64: Blazey discloses a protein that is a low moisture protein concentrate of milk or dried milk protein concentrate [col. 6, lines 46-48, 53-56].

20. Regarding Claims 15, 69: Blazey discloses 6% of a flavor compound added to the cheese [Ex. 5] where the instant claim recites .1% to 20%.

21. Regarding Claim 70: Blazey discloses where the fat source is cream or butter [col. 6, lines 38-40].

22. Regarding Claims 71 and 72: Blazey discloses where the heating step is carried out at 80°C for 2 minutes.

23. Claims 2, 3, 8, 11, 31, 34-38, 40-43, 45, 49, 50-53, 55-58, and 62 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US patent 6,177,118) and further in view of Lashkari (UK 1,057,170) and Bernard et al. (US

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Patent 4,948,613) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).

24. **Regarding Claims 2, 11, 36, 37, 38:** Blazey discloses a process of making cheese as discussed in Claim 1 and further discloses where the product is packaged for refrigeration [col. 8, lines 47-48] where the instant claim recites cooling the product. Skovhauge teaches coagulation with lactic acid and at temperatures as discussed above in claim 1. Lashkari discloses a cheese flavor composition containing the mold *Penicillium roqueforti* as discussed above in Claim 1. Blazey does not explicitly disclose a cooling step, application of viable organisms to the surface or allowing cheese to ripen. However, Bernard discloses a cheese product that is cooled, the surface of the cheese is inoculated with micro-organisms that grow and promote ripening of the cheese [col. 4, lines 48-55].

25. At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Blazey, Lashkari and Bernard before him or her to modify the process of Blazey with the flavor concentrate of Lashkari to include the cooling, surface inoculation and ripening steps of Bernard because Blazey and Bernard both disclose cheese products that are similar to traditionally made cheeses [Bernard col.2, lines 33-36]. In order to get a more traditional texture and overall organoleptic qualities in the non-traditionally made cheese Bernard discloses that the application of the microbes to the surface of the cheese produces a surface bloom similar to traditional cheese [col. 4, lines 49-55].

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26. **Regarding Claim 3, 45, 51, 52, 53:** Blazey discloses a process of making cheese as discussed in Claims 1 and 2 and further discloses dividing cheese into slices, block form, or in tubs and that because making a cheese mass is the first step in making processed cheese that other ingredients can be added to the cheese to product block forms, slices and spreads [col. 7, lines 57-67. col. 8, lines 1-5]. Skovhauge teaches coagulation with lactic acid and at temperatures as discussed above in Claim 1. Lashkari discloses a cheese flavor composition containing the mold *Penicillium roqueforti* as discussed above in Claim 1. Bernard discloses a cheese product that is cooled, the surface of the cheese is inoculated with micro-organisms that grow and promote ripening of the cheese as discussed above in Claim 2.

27. **Regarding Claims 8, 62:** Blazey discloses a process of making cheese as discussed in Claim 1 but does not disclose applying viable microorganisms to the surface and allowing to ripen. However, Bernard discloses applying viable organisms to the surface and allowing to ripen as discussed above in Claim 3.

28. **Regarding Claim 31:** Blazey discloses dividing the cheese into slices, blocks or spreads [col. 7, lines 57-67. col. 8, lines 1-5] where the instant claim recites dividing into portions.

29. **Regarding Claims 34, 49:** Blazey discloses Mozzarella made by the process that has body, texture and the ability to be grated [col. 15, lines 35-37] where the instant claim recites shredded or particulated.

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30. **Regarding Claims 35, 50:** Blazey discloses a protein that is a dried milk protein concentrate [col. 6, lines 53-56] where the instant claim recites milk protein concentrate, or renneted milk, or reconstituted milk protein concentrate.

31. **Regarding Claims 40, 55:** Blazey discloses 6% of a flavor compound added to the cheese [Ex. 5] where the instant claim recites .1% to 20%.

32. **Regarding Claims 41, 56:** Blazey discloses where the fat source is cream or butter [col. 6, lines 38-40].

33. **Regarding Claims 42, 43, 57, 58:** Blazey discloses where the heating step is carried out at 80°C for 2 minutes.

34. **Claims 6, 7, 60, 61, are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US patent 6,177,118) and further in view of Lashkari (UK 1,057,170), and Chikuma (US Patent 3,091,539) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).**

35. **Regarding Claims 6, 7, 60, 61:** Blazey discloses a process of making cheese as discussed in Claim 1 but does not disclose where the cheese is subject to freezing. However, Chikuma discloses a method of making a cheese product by freezing, thawing and further ripening curd [col. 3, lines 1-6]. Lashkari discloses flavor as discussed above.

36. At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of Blazey , Lashkari, and Chikuma before him or her to modify the process of Blazey to incorporate a freezing step, thawing and ripening step

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in order to stop any undesired enzymatic reactions by freezing and to allow for further ripening of the cheese to enhance the flavor of the cheese product.

37. Claims 14 and 68 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US Patent 6,177,118) and further in view of Lashkari (GB 1,057,170) and Bauman (US Patent 2,965,492) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).

38. Regarding Claims 14 and 68: Blazey discloses a process of making cheese as disclosed in Claim 1. Lashkari discloses a flavor concentrate made from a mold as discussed in claim 1 but neither reference discloses where the flavor concentrate additionally discloses a flavor-enhancing bacterium that produces lactic acid, propionic acid, or butyric acid. However, Bauman discloses preparing a dried cheese product where the condensed milk is inoculated with lactic acid starter and *Penicillium roqueforti* [col. 4, lines 55 - 64].

39. At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Blazey, Lashkari and Bauman before him or her to incorporate a lactic acid starter in order to help implant *P. roqueforti* and serve as fuel for *P. roqueforti*.

40. Claims 24 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US Patent 6,177,118) and further in view of Lashkari (GB 1,057,170) and The American Cheese Society (<http://web.archive.org/web/20040917204831/http://www.cheesesociety.org/displa>

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ycommon.cfm?an=1&subarticlenbr=5) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).

41. Regarding Claims 24 and 73: Blazey discloses a process of making cheese as disclosed in Claim 1 and further discloses packaging the cheese for refrigerated storage [col. 8, line 48]. Lashkari discloses a flavor concentrate made from a mold as discussed in claim 1 but neither reference explicitly discloses storing the cheese at temperatures between 5°C to 35°C and a relative humidity of 80% or greater. However, The American Cheese Society discloses that cheese should be stored between 35°F and 45°F (1.6°C to 7.2°C) at a high humidity level [2nd paragraph].

42. At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Blazey, Lashkari, and The American Society to store the cheese at 35°F and 45°F (1.6°C to 7.2°C) and at a high humidity because storage under these condition are well known in the art and help retain freshness and organoleptic quality of the cheese. Further, although The American Cheese Society does not disclose the same temperature range as in the instant claim, one having ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by The American Society overlap the instantly claimed proportions and therefore are considered to establish a prima facie case of obviousness. *In re Malagari* 182 USPQ 549,553. Further, although The American Cheese Society does not explicitly disclose the humidity as higher than 80% it does disclose that the humidity must be high, therefore it would have been obvious to one having ordinary skill in the art at the time of

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the invention to adjust the humidity level for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

43. Claims 32, 33, 46, 47, 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US patent 6,177,118) and further in view of Lashkari (UK 1,057,170), Bernard et al. (US Patent 4,948,613), and Chikuma (US Patent 3,091,539) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).

44. Regarding Claims 32, 33, 46, 47, 48: Blazey discloses a process of making cheese as discussed in Claim 1 but does not disclose where the cheese is subject to freezing. However, Chikuma discloses a method of making a cheese product by freezing, thawing and further ripening curd [col. 3, lines 1-6]. Lashkari discloses flavor and Bernard discloses cooling, inoculating the surface, and ripening as discussed above.

45. At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of Blazey, Lashkari, Bernard, and Chikuma before him or her to modify the process of Blazey to incorporate a freezing step, thawing and ripening step in order to stop any undesired enzymatic reactions by freezing and to allow for further ripening of the cheese to enhance the flavor of the cheese product.

46. Claims 39 and 54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US patent 6,177,118) and further in view of Lashkari (UK 1,057,170), Bernard et al. (US Patent 4,948,613) and Bauman (US Patent 2,965,492)

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and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).

47. **Regarding Claims 39 and 54:** Blazey discloses a process of making cheese as disclosed in Claim 1. Lashkari discloses a flavor concentrate made from a mold as discussed in claim 1 but neither reference discloses where the flavor concentrate additionally discloses a flavor-enhancing bacterium that produces lactic acid, propionic acid, or butyric acid. Bernard discloses a cheese product that is cooled, the surface of the cheese is inoculated and ripened as discussed above. However, Bauman discloses preparing a dried cheese product where the condensed milk is inoculated with lactic acid starter and *Penicillium roqueforti* [col. 4, lines 55 - 64].

48. At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Blazey, Lashkari, Bernard and Bauman before him or her to incorporate a lactic acid starter in order to help implant *P. roqueforti* and serve as fuel for *P. roqueforti*.

49. **Claims 44 and 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blazey et al. (US patent 6,177,118) and further in view of Lashkari (UK 1,057,170), Bernard et al. (US Patent 4,948,613) and The American Cheese Society (<http://web.archive.org/web/20040917204831/http://www.cheesesociety.org/displaycommon.cfm?an=1&subarticlenbr=5>) and as evidenced by Skovhauge et al. (US Patent 4,655,127) and Groesbeck et al. (US Patent Number 5,455,051).**

50. **Regarding Claims 44 and 59:** Blazey discloses a process of making cheese as disclosed in Claim 1 and further discloses packaging the cheese for refrigerated storage

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[col. 8, line 48]. Lashkari discloses a flavor concentrate made from a mold as discussed in claim 1 and Bernard discloses cooling, inoculating and ripening as discussed above but the references do not explicitly disclose storing the cheese at temperatures between 5°C to 35°C and a relative humidity of 80% or greater. However, The American Cheese Society discloses that cheese should be stored between 35°F and 45°F (1.6°C to 7.2°C) at a high humidity level [2nd paragraph].

51. At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Blazey, Lashkari, Bernard, and The American Society to store the cheese at 35°F and 45°F (1.6°C to 7.2°C) and at a high humidity because storage under these condition are well known in the art and help retain freshness and organoleptic quality of the cheese. Further, although The American Cheese Society does not disclose the same temperature range as in the instant claim, one having ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by The American Society overlap the instantly claimed proportions and therefore are considered to establish a prima facie case of obviousness. *In re Malagari* 182 USPQ 549,553. Further, although The American Cheese Society does not explicitly disclose the humidity as higher than 80% it does disclose that the humidity must be high, therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the humidity level for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to FELICIA C. KING whose telephone number is (571)270-3733. The examiner can normally be reached on Mon- Thu 7:30 a.m.- 5:00 p.m.; Fri 7:30 a.m. - 4:00 p.m. alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on 571-272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/FELICIA C KING/
Examiner, Art Unit 1794

/JENNIFER MCNEIL/
Supervisory Patent Examiner, Art Unit 1794